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In the Supreme Court of the United States

OCTOBER TERM 1958

No. 52

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

SUPPLEMENTAL BRIEF OF RESPONDENT

ROBERT T. MAUTZ,
ARNO H. DENECKE,
10th Floor,
Board of Trade Building,
Portland 4, Oregon,
Attorneys for Respondent.

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Supplemental Brief on Points No. 3 ("The 'twilight zone' cannot be expanded to include cases of this type") and No. 4 ("The facts of this accident do not place it wthin the 'twilight zone' ") of re-pondent's argument.

Flowers v. The Travelers Insurance Company, 258 F.2d 220 (CCA 5th, July 15, 1958). As gathered from the opinion, the facts in this case were that "Flowers was injured while performing duties as a welder in making repairs on the SS REDSTONE, a large ocean-going tanker. The vessel was in floating drydock in Todd Shipyard in Galveston Harbor. * * * His (Flowers)

presence on board the ship, actively working as a welder, essential to the making of essential repairs, was nonetheless maritime even though 80% of his work was generally ashore in the plate department of the Shipyard. The nonmaritime nature of the so-called regular work or duties is completely irrelevant."

The Texas Industrial Accident Commission rejected a claim made under the Texas Act. Statutory appeal permitted a trial de novo which was removed to the Federal Court on diversity.

Judge Brown, speaking for the Court, stated:

"We speak of them (*Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S. Ct. 239, and *Baskin vs. Industrial Accident Commission*, 338 U.S. 854, 70 S. Ct. 99) in this figure neither to disparage them nor to avoid their authoritative force, if, and to whatever extent, they are applicable. But we, with others, and perhaps the court itself, see in these actions either uncertainty, if not now then assuredly in the making, and an accentuated instability in the every day administration of compensation acts to amphibious employees if these are thought to throw down the bars in complete disregard of the philosophy expressed in *Parker v. Motor Boat Sales, Inc.*, supra, and to this date not repudiated that Congress meant to draw the line where *Jensen* left it. * * *

"We think that the court by subsequent action has made it quite plain that it had no such revolutionary purposes in mind. *Pennsylvania R. R. Co. v. O'Rourke*, 344 U.S. 334, 73 S. Ct. 302, has, in our judgment, been given altogether too little attention. * * *

"It added the further and entirely new concept that where coverage of Section 903(a) is applicable, the exclusive liability of Section 905 does not de-

pend on the nature or character of the work being done by the injured employee so long as (1) that injury occurs on navigable waters and (2) the employer is such a person '*any* of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any drydock).' Sec. 904(4)."

The Court further stated:

"If, as some suggest, literal application of *Moore's* and *Baskin* means that all is either twilight or may be made so by the injured employee, the carefully devised machinery for the orderly, routine processing of compensation benefits under the Longshoremen's Act will either be wrecked by continual tinkering of State agencies or will fall into a state of disrepair from neglect and nonuse."

The Court finally concluded:

"What has happened in Texas and Louisiana may soon occur amongst the maritime workers of Mississippi, Florida and Georgia. If with no marginal employment, no obscurity concerning the nature and kind of work or its importance to maritime commerce, no undefined or undefinable boundaries to set it apart from land-based activity, it is nontheless left entirely to the choice of the injured employee to determine which route he will take, then *Jensen* has indeed lost its vitality, the *Jensen* line of demarkation, reaffirmed in *Parker*, has been overruled, and administrative finality, emphasized in *Davis* is just so much makeweight. When the destructive consequences are so rife, when thirty years' experience in the operation of the Longshoremen's Act would be disturbed by introducing uncertainty and confusion where, as to these two fields of ship repairmen and longshoremen, there is Federal assurance in the everyday administration of the Act, we decline to hold that the Court had such portentous purposes for Moore's or Baskin.

"The outlines of a case of an injury received on navigable waters while engaged in essential repairs to an existing vessel have long been clear and distinct. As to them, there was no twilight. *Moore's* and *Baskin* were devised to solve cases in, not to create, the twilight. The District Judge was right in holding that the Texas Act could not apply and that this was a case for the exclusive application of the Federal Act."

Respectfully submitted,

ROBERT T. MAUTZ,
ARNO H. DENECKE,
10th Floor, Board of Trade Bldg.,
Portland 4, Oregon,
Attorneys for Respondent.